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Texas Dental Association and Nathan Clark and Barbara Jean Lockerman and Patricia St. Germain.
Cases 16–CA–25349, 16–CA–25383, and 16–CA–25840

November 25, 2009

ORDER DENYING MOTIONS

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On July 29, 2009, the National Labor Relations Board issued a Decision and Order in this proceeding, finding that the Respondent violated Section 8(a)(1) by discharging employee Nathan Clark because he engaged in protected concerted activities and by discharging Supervisor Barbara Lockerman because she refused to engage in unfair labor practices.¹ The Board ordered the Respondent, among other things, to reinstate Clark and Lockerman with backpay. Thereafter, on August 25, 2009, the Respondent filed motions for reconsideration and to reopen the record. The General Counsel filed an opposition to the Respondent’s motions.

Having duly considered the matter, we find that the Respondent’s motion for reconsideration does not present “extraordinary circumstances” warranting reconsideration under Section 102.48(d)(1) of the Board’s Rules and Regulations.²

With regard to the merits of Clark’s discharge, the Respondent simply cites and incorporates by reference its prior brief to the Board. The Respondent also relies on its prior brief concerning Lockerman. Specifically, the Respondent again urges the Board to rely on *P. R. Mallory*, 175 NLRB 308, 313 (1969), and challenges the

Board’s finding that the circumstances of this case are instead analogous to those in *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), enf’d. 702 F.2d 1 (1st Cir. 1983).³ We find that the Respondent has neither specified extraordinary circumstances nor identified any material error by the Board, as required by the Board’s Rules. Accordingly, we deny the Respondent’s motion for reconsideration concerning the Board’s findings on the merits.⁴

The Respondent also seeks to reopen the record to introduce evidence that the Board’s Order to reinstate Clark and Lockerman imposes an undue economic burden on the Respondent, based on changes to the positions that have allegedly occurred since the close of the hearing. We deny the Respondent’s motion to reopen the record, because the issues that the Respondent raises are appropriately resolved at the compliance stage of this proceeding. The Respondent will have the opportunity to show at that time, on the basis of evidence that was not available as of the close of the unfair labor practice hearing, that reinstatement of Clark and Lockerman would be unduly burdensome.⁵

Dated, Washington, D.C. November 25, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ 354 NLRB No. 57 (2009).

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

³ In *Howard Johnson*, the Board found that a supervisor was unlawfully terminated because she refused to comply with the employer’s after-the-fact demand that she disclose the identities of employees present at a union meeting that she had voluntarily attended. In *P. R. Mallory*, on the other hand, the Board adopted the judge’s decision that the evidence was insufficient to establish that the employer discharged the supervisor based on her failure to report an employee’s voluntary disclosure of his involvement in union activity. The judge in *P. R. Mallory* further stated that, even accepting the General Counsel’s position as to the reason for the employer’s action, it was not clear under Board precedent that the termination would be unlawful in the absence of a request by the employer that the supervisor engage in and report on surveillance of union activity. Although the Board’s earlier decision did not explicitly discuss this statement in *P. R. Mallory*, it explained in detail the finding that Lockerman’s termination was based on her failure to cooperate in the Respondent’s unlawful efforts to identify and discharge employees involved in protected concerted activity.

⁴ The Respondent accurately points out that, in the final paragraph of its decision, the Board mistakenly refers to the Respondent’s conduct in response to the employees’ protected concerted activity as “antiunion efforts.” This inadvertent error will be corrected in the Board’s bound volumes.

⁵ See *Noel Corp.*, 315 NLRB 905, 913 fn. 46 (1994); *Ferragon Corp.*, 318 NLRB 359, 363 (1995); *Tricil Environmental Management*, 308 NLRB 669, 669 fn. 3 (1992).

